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ABSTRACT

A study examined how well managing editors are equipped for the task of dealing with libel. Subjects, 32 (out of 46) managing editors of Kansas newspapers, responded to a questionnaire which presented eight fact situations, hypothetical, but based on reported decisions of the Kansas Supreme Court. Each decision contributed legally valid precedent and thus is the "law" in Kansas. Subjects were asked to decide whether or not the plaintiff had a case. Results indicated that a majority of the editors responded correctly to six of the eight cases. Results also indicated that editors that are more libel conscious (those managing larger circulation papers, involved in recent litigation, and those insured for libel) appear to exhibit much greater wariness in approaching potentially actionable material. (RS)

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APPLICATION OF LIBEL LAW PRINCIPLES BY KANSAS EDITORS

by

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INTRODUCTION

Libel litigation is a growing threat to the media. Both the number of libel cases filed and the amount of jury awards have escalated in recent years (Smolla, 1983, p. 4).

In many cases, these lawsuits might have been prevented in the editorial process. Thus, one might assert that editorial awareness and caution can help keep media defendants out of court and avert the problem. On the other hand, too much caution may result in the kind of timid press which the First Amendment freedom of the press guarantee was designed to prevent. If editors see libel problems at every turn and delete all material that might offend a potential plaintiff, our society might well end up with newspapers containing very little news of any importance.

It is apparent that some balance must be struck. Editors must not only recognize libel when they see it, they must also recognize the kinds of material that are protected under our legal system. Embarrassing or offensive material is not necessarily libelous. In a free society, it is sometimes the duty of the press to report unpleasant material, especially concerning the conduct of public officials or those in the public eye.

The law of libel is complex. It is full of exceptions and contradictions that are confusing to lawyers and

judges, let alone working journalists. Libel is primarily a creature of the common law, and, in the past 25 years, a creature of constitutional interpretation. In other words, libel doctrine was not created by Congress or state legislatures. It is judge-made law, and, as such, is not found in any statute book, but in the hundreds of reported cases of a given jurisdiction. For the layman, even finding, much less comprehending, the relevant caselaw is an impossible task.

Managing editors are in a difficult position. They must recognize and delete potentially libelous passages from stories, yet must not err on the side of caution. The newspaper must not be needlessly exposed to the risks of litigation, but the news must be reported as fully and completely as possible. To make effective decisions concerning what material is or is not published in their newspapers, managing editors must be sufficiently versed in the legal implications of the stories they consider publishing.

There seems to be a dearth of studies conducted with the aim of determining exactly how editorial decisions are influenced by legal decisions. Numerous communications and legal journals devote space to analyses of the court decisions themselves, but few seem to examine how those making editorial determinations perceive the law made by judicial bodies.

Anderson and Murdock (1981) conducted a study to

determine how the Burger Court was viewed by newspaper editors, finding that while editors could not agree that they were "less aggressive," they nonetheless described themselves as "increasingly careful." Silver and Bow (1983) studied the impact of Herbert v. Lando (1979) on newspaper managing editors and television news directors. More than half of those responding indicated that the decision was having no effect on either the reporting or editing of news stories. Kittross (1988) studied the effect of recent libel cases on television newsrooms.

This study examined how well managing editors are equipped for the difficult task of dealing with libel. Kansas managing editors were presented with eight fact situations. While these fact situations were presented as hypotheticals, each fact situation was derived from reported decisions of the Kansas Supreme Court. Each decision constitutes legally valid precedent and thus is "the law" in Kansas. The decisions all deal with some aspect of libel law. By comparing the editors' responses with the decisions of the Kansas Supreme Court, one can determine whether the editors actually understand and can apply libel principles to concrete fact situations -- the kind faced every day by editors. The responses should give some indication of how editors deal with potential libel problems and what areas require special attention by editors, educators and lawyers.

METHOD

A mail questionnaire was sent to all daily newspaper managing editors in Kansas as listed in the 1987 edition of the Editor and Publisher Yearbook. The questionnaire set forth eight factual situations concerning libel law. The factual situations were taken from the Kansas Reports, the full-text reports of the decisions of the Kansas Supreme Court. The decisions were final, authoritative declarations of Kansas libel law as applied to the given facts. The cases were chosen to represent important libel precedents with facts of the sort that a managing editor might frequently be required to consider. To assure the continued validity of the decisions, the citations of the cases were checked through Shepard's Citations to be certain that no case had been reversed, overruled or otherwise limited.

From the chosen cases, the decisive facts were presented in eight cases in the survey. All names were changed to prevent the editors from recognizing a given case. Following the presentation of each factual situation, the respondents were asked to decide the issue decided by the Kansas Supreme Court.

The survey also obtained the following information: circulation size of the newspaper, sources of media law information used by the editor, previous involvement of the newspaper in libel litigation, libel insurance coverage, and the extent to which the newspaper relies on attorneys

to safeguard against potentially libelous material.

RESULTS

Thirty-two of the 46 managing editors returned the survey, resulting in a 70 percent return rate. The study functioned as a census of the entire population of Kansas daily managing editors.

The first case scenario in the survey read as follows:

> The Centerville Telegraph runs an item announcing the birth of a baby girl to Mr. and Mrs. James Crawford of Centerville. The announcement also states that the couple have two other children, ages nine and six. Mrs. Crawford is identifiable, as a result of a reference to the names of the grandparents of the child, as Jean Marie Smith. James Crawford files a libel suit against the Telegraph, claiming that he is in fact a bachelor, is not married to Jean Marie, and, furthermore, that Jean Marie is a "woman of ill repute" in the small town who is widely known to have given birth to numerous illegitimate children. Does Crawford have a case?

This question is based on Karrigan v. Valentine (1959). In the Karrigan case, the Kansas Supreme Court considered whether the suggestion that the plaintiff was married to a woman of ill repute was libel per se or libel per quod. The defense contended that the birth report was neither and that the plaintiff had no cause of action under these facts.

Libel per se is a form of libel in which the words in question are damaging on their face, without the need to prove extrinsic circumstances demonstrating damage to reputation. Libel per quod consists of words which are not

necessarily damaging on their face, but which can become so depending on proof by the plaintiff demonstrating extrinsic facts that make the words damaging to the plaintiff's reputation.

Table 1

Responses to Cases

Case number	Yes	No
1.	*31%	69%
2.	41%	*59%
3.	*77%	23%
4.	23%	*77%
5.	55%	*45%
6.	7%	*93%
7.	*90%	10%
8.	*63%	37%

*Denotes correct response

In Karrigan, the Court held that although the birth announcement did not constitute libel per se, the plaintiff's complaint had stated a case of libel per quod. Thus, the correct answer to the question was "yes." Thirty-one percent of the respondents correctly responded that the plaintiff had a case. Sixty-nine percent of responding editors indicated that the plaintiff did not have a case.

The second case scenario contained in the survey stated as follows:

> Robert Johnston, a well known local attorney, undertakes to defend Mary Powers, who has been accused of murdering her husband. Contrary to ethical practice, Johnston asks Powers to sign a "contingency fee" agreement. The agreement entitles Johnston to 90 percent of the insurance proceeds from policies on Powers' late husband if she is acquitted. The agreement comes to light and Johnston is censured by the State Board of Law Examiners. A news story in the local paper states that Johnston was censured "for his conduct of the defense" of Powers. The story also states that Johnston "required" Powers to agree to the contingency agreement. Johnston sues for libel, claiming that his conduct of the defense was beyond reproach and that Powers voluntarily signed the contingency agreement. Were the statements libelous?

This question is based on Steere v. Cupp (1979). In Steere, the Kansas Supreme Court held that the published statements regarding the plaintiff's "conduct of the defense" and the "required" contingency fee agreement were "substantially true." The Court stated as follows:

> Steere's censure arose out of his defense of Nellie Schoonover and whether he required her to sign the contingent fee contract or had her sign it or let her sign it, is of no consequence. Appellant [Steere] was the lawyer. It was his duty to know the law and the possible ethical violation. He was responsible for the contract, not Nellie Schoonover. He drafted the instrument, had it typed and took it to the jail for Mrs. Schoonover to sign. Under the circumstances, the use of the word "required" is not out of line. (Steere v. Cupp, 1979, p. 575)

Thus, while the published statements were perhaps not literally true, the Court held that they were close enough to the truth to avoid a finding that they were libelous.

The correct answer to question two was "no." A majority of editors (59 percent) correctly responded that the statements were not libelous. A large minority (41 percent) believed the statements were libelous.

The third question stated as follows:

> J. J. Lowery, editor of the Jamestown Journal, publishes an article stating that a rival paper, The Shopper, might soon be changing hands. The article states that the potential new owner, Michael Atwood, would be "all right. In fact, anybody would be an improvement on the eunuch who is snorting around in the basement, but unable to do anything else." Although John Crowley, the current owner, wasn't mentioned by name, it is apparent to residents of the area that the statement refers to Crowley. Does the statement libel Crowley?

This question was based on Eckert v. VanPelt (1904). The defendant argued both that the article was not libelous because the plaintiff was not mentioned by name and that the term "eunuch" was not libelous per se because the term carries a secondary meaning connoting weakness or barrenness.

The Kansas Supreme Court disposed of both arguments in upholding the trial court's verdict of $700 for the plaintiff. The Court stated that even though the article did not contain the plaintiff's name, Kansas law only required that he show at the trial that the words were intended to apply to him and that the public understood the words to refer to him. The Court also held that the "primary and general definition" of the word eunuch is "a

castrated male of the human species." (Eckert v. VanPelt, 1904, p. 360) Thus, when the word is considered in its ordinary sense, it is libelous per se because it exposes the plaintiff to public hatred, contempt or ridicule. The correct answer to the question was "yes." Seventy-seven percent of the editors agreed that the statement was libelous, while 23 percent concluded the words were not libelous.

The fourth survey question stated as follows:

> John Law was a local Blue City lawyer who became the subject of a disbarment proceeding. As is usual in such cases, the Kansas Supreme Court appointed a commissioner to hear the facts and write a report on his or her findings and conclusions in the case. The Blue City Gazateer obtained a copy of the commissioner's report and summarized it in a news story. The headline of the story stated: "Findings by Supreme Court." Law sued, claiming the headline was libelous. The body of the story made it clear that it was the Commissioner's report that was being summarized. Can Law recover?

The question was based on the case of Little v. Allen (1939). The main issue before the Court was whether an allegedly libelous inaccuracy in a headline could be "redeemed" by accurate information in the body of the story. The Court took the view that while headlines themselves, if sufficiently misleading, can be libelous, in general, headlines "are designed to do no more than to direct the attention of the reader to the article itself." (Little v. Allen, 1939, pp. 415-416)

The Court held that headlines and body copy must be considered as a whole. In Little, the Court said, "no one reading the headlines and the article would be misled by the slightly innaccurate statement in the headlines." (Little v. Allen, 1939, p. 416) As a result, the Court upheld the trial court's decision in favor of the defendant. The correct answer to the question was "no." Seventy-seven percent of the editors responded in agreement with the Court that the lawyer could not recover for the inaccurate headline. A minority (23 percent) of respondents concluded that recovery was possible under the facts of this case.

The fifth survey question stated as follows:

> Jan Chaffee is an officer of Fly-By-Night Construction, a Kansas corporation engaged primarily in home remodeling work. The local newspaper reports that the corporation "is locally regarded with disfavor and distrust, and as a get-rich-quick scheme." The paper also reports that a state banking examiner called the corporation "a paper concern." Chaffee files suit, alleging that the paper has libeled her. Can she recover?

Schreiber v. Gunby (1910) provided the basis for this question. Although the case dealt with several different issues and counts raised by the plaintiffs, the crucial holding for these purposes is that the plaintiffs, officers of the corporation, were held to have no personal cause of action against the defendant for statements referring to the company as a corporation -- a separate legal entity. In other words, the corporation had its own legal existence separate from its officers, and a

statement that might harm the corporate reputation gave no personal cause of action to its officers. The correct answer to the question was "no." A sizable minority of respondents (45 percent) chose the correct answer, while 55 percent responded that the officer could recover.

The sixth survey question stated as follows:

> Robert Crosly was a candidate for re-election to the Kansas Senate. During his first term, Crosly supported a bill reducing possession of marijuana to an unclassified misdemeanor with a maximum penalty of $100 for the first offense. Crosly also supported a bill repealing criminal penalties for sodomy between consenting adults. During the election, the local newspaper ran an editorial stating that Crosly favored "pot" and "gays." The editorial also stated that Crosly wanted to "de-criminalize" marijuana and "legalize" homosexuality. The editorial cited the Biblical story of Sodom and Gomorrah and quoted drug addicts who claimed they got their start on marijuana. Crosly sues for libel. Can he recover?

This question was based on Hein v. Lacy (1980). The Hein case actually involved publication in a brochure by a political opponent of the plaintiff rather than publication in a newspaper. Nonetheless, the applicable libel doctrines remain the same.

The Kansas Supreme Court held that the trial court had acted correctly in granting summary judgment to the defendant. The Court found that the brochure's statements that the plaintiff had voted to "decriminalize" marijuana and "legalize" homosexuality were substantially true, in that the plaintiff had voted for bills that would have

reduced penalties for possession of marijuana and repealed criminal sanctions in cases of sodomy between consenting adults. The Court stated as follows:

> On the basis of the undisputed factual circumstances contained in the record, we hold that the statements made in the defendant's letter were substantially true. However, it should be added that the whole truth was not stated. It seldom is in political campaigns. (Hein v. Lacy, 1980, pp. 262-263)

The Court also stated the principle that a public official seeking reelection cannot, as a general rule, successfully maintain a libel action. Citing such cases as Coleman v. MacLennan (1908) and New York Times Co. v. Sullivan (1967), the Court made it clear that public officials have a difficult burden to meet in defamation actions (the actual malice rule) and that the plaintiff at bar had not met that burden. The correct answer to the question was "no." An overwhelming majority (93 percent) of the editors correctly concluded that the plaintiff could not recover.

The seventh survey question stated as follows:

> Jane Harper was a candidate for a seat on the Hooterville City Commission. Harper finished last in the election. The day after the election, the Hooterville Chronicle ran a story detailing Harper's losing campaign strategy, which emphasized absentee ballots from nursing homes. The story also discussed Harper's poor employment record, failed attempts to initiate recall actions against city officials, and recent retirement as a controversial police official. In the ensuing libel suit, the Chronicle based its

> defense on Harper's status as a "public figure." As a "public figure," Harper would have to prove that the story was published with actual malice in order to win the lawsuit. Harper argued that, following the election, she was no longer a "public figure." After the election, Harper asserted, she was no longer voluntarily thrusting herself into public affairs. Is Harper legally a public figure?

This question was based on Redmond v. Sun Publishing Co. (1986). The Kansas Supreme Court held that once the plaintiff became a candidate for public office, he was a public figure for all purposes. The Court stated that because the article came only one day after the plaintiff's unsuccessful bid for office, the facts concerning both the plaintiff's past and his failed campaign were "of public concern. Once these facts entered the public domain, they remained there and subjected Redmond to comments as a public figure." (Redmond v. Sun Publishing Co., 1986, p. 35) As a result, the actual malice rule applied. The correct answer to the question was "yes." Ninety percent of the respondents correctly indicated that the plaintiff was still a public figure when the story was printed, while 10 percent apparently felt that public figure status vanishes immediately after the event that produced that status ends.

The eighth question in the survey stated as follows:

> Mark Sheridan was accused of a triple murder in Blue City, Kansas. The Blue City Beacon wrote a sensational account of the events surrounding the charge. The Beacon referred to Sheridan as the "Killer Who Came Straight From Hell," although Sheridan had not been found guilty at the time the story was

printed. Sheridan was subsequently convicted of the murders. Prior to his conviction, Sheridan filed a libel suit against the Beacon. Among other defenses, the Beacon claimed that Sheridan was a "public figure" who must prove actual malice on the part of the Beacon. Among the factors the Beacon cited to support its position that Sheridan was a public figure were: (1) Intense media coverage of the murder investigation and its eventual focus on Sheridan; (2) Sheridan's voluntary act of turning himself in to police, seeking protective custody; and (3) Sheridan's arrest and indictment for the crimes. Sheridan argued that he didn't voluntarily thrust himself into the forefront of the controversy. Is Sheridan legally a public figure?

This question was based on Ruebke v. Globe Communications Corp. (1987). In Ruebke, the actual publication of the story was in "Startling Detective" magazine rather than a local newspaper. Citing the three factors mentioned in the survey question, the Kansas Supreme Court stated that although no one factor by itself would have been sufficient to confer the status of "public figure" on the plaintiff, when taken together these factors were enough to confer that status.

The Court stated that public figure status is not a matter of choice, but rather "the result of acts or events which by their nature are bound to invite comment." (Ruebke v. Globe Communications Corp., 1987, p. 601) The correct answer to the question was "yes." A majority (63 percent) of editors also concluded that the plaintiff was a public figure, but a sizable minority (37 percent) disagreed.

As might be expected in a sparsely populated state such as Kansas, most of the editors worked on smaller circulation newspapers. The majority (53 percent) worked for papers with less than 7,500 circulation. The next largest group (31 percent) were associated with papers with circulations between 7,500 and 14,999. Six percent of the editors' newspapers fell into the 15,000 to 29,999 category and 9 percent had circulations of 30,000 or more.

Only 16 percent of editors' papers had been sued for libel within the five years preceding the survey. Nonetheless, a sizable majority (82 percent) of the respondents' newspapers carried libel insurance.

Most of the respondents' papers had some contact with an attorney concerning potentially libelous material. Only 16 percent indicated they checked questionable stories or passages with an attorney once a month or more often, but 97 percent checked such material with an attorney prior to publication at some less-frequent interval. Only two respondents indicated their employers had in-house counsel, but 78 percent of the respondents' papers kept an attorney on retainer.

DISCUSSION

On the whole, the editors who responded to the survey demonstrated an awareness of libel law. A majority of editors responded correctly to six of the eight cases in

the survey. A number of the cases presented difficult legal issues that could not be resolved with a superficial knowledge of the subject. However, the study points out the need for greater legal sophistication in dealing with certain issues.

Cases #1 and #5 were the two cases which a majority of respondents answered incorrectly. The responses to case #1 -- the erroneous birth announcement -- suggest that most editors did not recognize the danger of misidentification in a context that, viewed in isolation, seems relatively innocuous. The crucial point seems to be that any misidentification is potentially actionable if the surrounding circumstances, which may be unknown to editors at the time of publication, subject the misidentified individual to ridicule or contempt. The responses to case #1 suggest that Kansas editors may need to become more aware of how crucial accuracy is, even in seemingly routine sections of the newspaper, such as birth announcements.

Case #5, the other case answered incorrectly by a majority of editors, dealt with a corporation's interest in reputation. The Kansas Supreme Court concluded that an officer of a corporation may not bring a libel action for statements that libel the corporation rather than the officer personally. Those surveyed may not have recognized that distinction. Nevertheless, editors need to become more aware of the separate legal status of individuals versus corporations.

Case #2, involving slight inaccuracies in a report of attorney misconduct, was answered correctly by only a slight majority of the editors (59 percent), even though the Kansas Supreme Court concluded on the same facts that the report was "substantially true." The responses suggest an attitude of caution among editors that may not be warranted. Likewise, 23 percent of those responding to case #4 seemed unaware of the rule that headlines must be read with the story when questions of libel arise.

Most editors were aware that calling a man a "eunuch," as discussed in case #3, is libelous. However, a minority apparently was unaware that simple "name calling" can be actionable, particularly, as here, when it suggests some personal defect that would cause harm to the plaintiff's reputation.

The last three cases -- #6, #7, and #8 -- all dealt at least to some degree with the issue of the enhanced protection accorded media defendants when writing about public figures and public officials. The fact that the majority of editors answered all three questions correctly might be explained in part by the sheer volume of discussion generated by New York Times v. Sullivan (1964) and its progeny. Most newspaper professionals have probably read and heard more about this area of media law than any other.

Aside from the basic truthfulness of the statements made about the candidate for state office in case #6, the

fact that the overwhelming majority of editors (93 percent) correctly recognized that the plaintiff could not recover suggests that the editors were aware of the special status of those who seek public office.

Ninety percent of respondents also recognized that public figure status does not end the day after the election -- the issue in case #7. Again, this suggests that the basic ideas contained in Sullivan and its progeny are widely known among Kansas editors.

Case #8 presented a more challenging application of the public figure doctrine -- the issue of the status of a criminal defendant who has not yet been convicted of any crime. A smaller percentage of editors (63 percent) were able to reach the correct conclusion that the criminal defendant was a public figure, despite little in the way of "voluntary" conduct on his part. The responses suggest that quite a number of editors may not be aware of the enhanced protection provided by this decision in certain circumstances.

Cross-tabulating the data revealed cases on which certain subgroups of editors were quite divided. While circulation size of the papers did not seem to be a valid predictor of legal knowledge, certain trends are observable. About half the cases (#2, #4, #7, and #8) were cases in which a correct answer required the editor to respond that statements were not libelous or that an

individual was a public figure. These cases, which might be referred to as "caution" cases, essentially require an editor to determine that it is legally safe to use the material in question, even though an editor attuned to libel problems might be reluctant to do so.

Editors of larger papers seemed to demonstrate this caution in their responses to case #8, in which a criminal defendant was held to be a public figure. This status would allow wider latitude for errors on the part of the publication. Eighty-one percent of the smallest circulation group (less than 7,500) correctly responded that the plaintiff was a public figure. The larger circulation groups seemed to exhibit much greater caution, with only 44 percent of the 7,500 to 14,999 group answering the case correctly. In the largest circulation group (30,000 or more) only one respondent of the group of three editors responded correctly.

This apparent caution is also exhibited in the group of respondents whose newspapers had been sued within the five years preceding the survey. Sixty percent of this group recognized the libelous birth announcement in case one, while only 26 percent of the group that had not been sued within five years answered the case correctly. Case #2, a "caution" case involving somewhat inaccurate but non-libelous statements about the discipline of an attorney, generated correct responses by 65 percent of the group that had not been sued, but only 40 percent of the

sued group responded correctly. Although the statements were held to be protected, the group that had been subjected to litigation chose the cautious, although incorrect, response.

Caution also may be a factor in differences between those editors whose papers had libel insurance and those whose papers were uninsured. Forty-three percent of the insured group spotted the actionability of the misidentified father in case #1, while none of the four respondents in the uninsured group responded correctly.

Generally, Kansas editors demonstrated an acceptable grasp of libel law. Certain subgroups demonstrated a wariness toward libel issues that suggests they may be removing protected material as well as libelous material when deciding what stories or passages can be published without fear of subsequent legal action. Future studies in this area might focus on other legal issues confronting Kansas editors, such as privacy and liability for emotional distress.

Those editors in the groups that are apparently more libel conscious (larger circulation papers, recent litigation, insured for libel) appear, not surprisingly, to exhibit much greater wariness in approaching potentially actionable material. These editors see libel both where it is and where it is not. This finding seems to suggest the existence of the so-called chilling effect among Kansas editors who are more involved with and aware of libel issues.

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